No. 83-2021

In the

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH MANDARINO,

Petitioner,

vs.

MARDYTH POLLARD, Individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, Individually and in his capacity as Village Manager of the Village of Lombard, Illinois; GREGORY YANGAS, Individually and as Trustee of the Village of Lombard, Illinois; WILLIAM FRANCIS, Individually and as Trustee of the Village of Lombard, Illinois; JOHN GARRITY, Individually and as Trustee of the Village of Lombard, Illinois; and THE VILLAGE OF LOMBARD, ILLINOIS, a municipal corporation and governmental subdivision of the State of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OF COUNSEL:

ALDO E. BOTTI
WALTER P. MAKSYM, JR.
PETER A. MONAHAN

BOTTI, MARINACCIO & MAKSYM, LTD.
Drake OakBrook Plaza
2211 York Road, Suite 208
Oak Brook, Illinois 60521
(312) 789-8585

Attorneys for *Petitioner*

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QUESTION PRESENTED

Whether a final judgment in a State Court action for declaratory relief and preliminary injunctive relief bars a subsequent federal claim for deprivation of liberty interests and civil and constitutional rights arising from the same set of operative facts.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joseph Mandarino, by and through his attorneys, Botti, Marinaccio & Maksym, Ltd., petitions

for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals is reprinted in full in the appendix hereto.

JURISDICTION

The judgment of the court of appeals (App. infra, 2a) was entered on October 7, 1983. A petition for rehearing was denied on December 8, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 2101(c).

STATUTORY AND OTHER PROVISIONS INVOLVED

First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia Shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1985 provides in pertinent part:

> If two or more persons in any

State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

42 U.S.C 1988 provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

The veracity of the following facts, taken from plaintiff's complaint, are undisputed for purposes of this appeal since the district court resolved this case on a motion to dismiss. See

Walter Processing Company v. Food Machinery and Chemical Corp., 382 U.S. 172, 86 S.Ct. 347, 14 L.Ed. 2d 247 (1965).

Petitioner, Joseph Mandarino (hereinafter referred to as "Mandarino") was, until terminated, an employee of the defendant, The Village of Lombard, Illinois (hereinafter referred to as "Village"), a municipal corporation and governmental subdivision of the State of Illinois, for over two (2) years as its duly appointed Chief of Police.

On or about June 12, 1979, following a purported two-month investigation by the Village Manager, alleging "improper activities", the Village Manager delivered to Mandarino a memo stating in part, "Your [Mandarino's] performance in the position hasn't measured up to my expectations". Mandarino was then

terminated from his employment with the Village under color of the provisions of Section 2.401020 of the Lombard Village Code and the Village's "home rule powers".

Mandarino requested specific reasons for his termination, but the Village refused to provide same. Similarly, the Village refused Mandarino's request for a public name-clearing hearing.

Mandarino claimed that he was actually discharged because he frequently rebuked the Village Manager and the Village Mayor for their attempts to interfere with the police department's operations and investigations. His termination followed immediately upon his refusal to give the mayor's husband an official police department badge. The mayor's husband was not a member of the police department, nor did he have any police training.

Mandarino alleged that following his termination, the Village Manager and Village Mayor gave false information to the press and other non-privileged individuals. The Village accused Mandarino, in the media, of ordering on-duty policemen to landscape his home, of "fixing" traffic tickets, of taking "illegal bribes", of interfering with police investigations, of violating liquor laws, and of misusing Village funds. These accusations were purportedly based upon a secret report which was the product of an investigation conducted by the Village. Neither the results of the investigation nor the secret report were ever referred to the DuPage County State's Attorney or the Office of the U. S. Attorney for the Northern District of Illinois.

Mandarino claimed that by reason of the actions of the defendants and by

refusing to grant him a name-clearing hearing, he suffered a loss of "liberty" and "property" rights as are protected by the Fifth and Fourteenth Amendments to the United States Constitution. He maintains that his termination, without formal charges or hearing, has left a cloud over his professional and personal reputation and has caused damage in his community standing. He also alleged that it would be futile for him to make application in the field of law enforcement by reason of the dissemination of information made in connection with his discharge. Mandarino claims that for all intents and purposes, he would be practically unable to regain his good reputation in the future because he would be honor bound to list The Village of Lombard as a prior employer; and in so doing, he would subject himself to disclosure of the above-described

false and stigmatizing comments and information which have become a part of his personnel file with said municipality. Mandarino also claims that his interests and good name, reputation, honor and integrity are at stake; and the actions of the defendants have imposed great and burdensome disabilities upon him which have foreclosed him and will continue to foreclose him the freedome to take advantage of other employment opportunities.

Initially, Mandarino brought a State court action for declaratory judgment and preliminary injunction against the Village only. His State claim was denied, and the trial court's decision was affirmed on appeal.

Subsequently, Mandarino brought the action, which is the subject of this petition, in the United States District Court for the Northern District

of Illinois, alleging that the circumstances of his discharge, particularly the failure to provide Mandarino with a name-clearing hearing, violated his rights under 42 U.S.C. Sections 1981, 1983, 1984, 1985, and 1988, as well as the First, Fifth and Fourteenth Amendments to the United States Constitution.

All defendants have filed a joint motion to dismiss plaintiff's complaint on the sole ground of *res judicata*. They argued that Mandarino's complaint against all defendants, including those defendants never sued before for any relief in any court, was barred in its entirety by the doctrine of *res judicata* due to plaintiff's unsuccessful declaratory judgment proceeding in the State court. Defendants contended that Mandarino could have joined all claims in his State court action and his failure to do so barred any subsequent claims arising from

the same set of facts.

The district court granted the joint motion of all defendants to dismiss and rendered its written opinion. In so doing, the court held that Mandarino's "failure to bring" his civil rights claim in his 1979 State court declaratory judgment action now "bars him" from "litigating those claims" in federal court.

Mandarino appealed the decision of the district court to the Seventh Circuit Court of Appeals. On appeal, Mandarino relied on the declaratory judgment exception to *res judicata* to argue that an action for declaratory relief, as opposed to action for coercive relief, bars relitigation of only the issues actually decided, but does not preclude a later action seeking coercive relief arising from the same set of operative facts. The Seventh Circuit

affirmed the trial court's dismissal on the ground of *res judicata*, holding that Mandarino waived the declaratory judgment exception argument by not presenting it to the court below. Alternatively, the Seventh Circuit ruled that even if Mandarino had not waived the declaratory judgment exception argument, it would not aid him because the joinder of his claim for declaratory relief with a claim for injunctive relief operated to take his argument outside of the declaratory judgment exception; and therefore, traditional *res judicata* principles apply, and all claims which could have been brought in the prior State court action were barred. Mandarino seeks review of such ruling by this Court.

REASONS FOR GRANTING THE PETITION

Mandarino contends that the court of appeals erred in two significant

respects: First, the court misapprehended the declaratory judgment exception in holding that Mandarino's complaint, which joined a claim for declaratory relief with a claim for preliminary injunctive relief, operated so as to render inapplicable the declaratory judgment exception to *res judicata*. Second, the court erred in holding that Mandarino had waived the declaratory judgment exception argument by failing to present such argument to the trial court.

The declaratory judgment exception finds its clearest expression in the Restatement (Second) of Judgments. Section 33(c) provides as follows:

> *C. Effects as to matters not declared.*
> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaratory

as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.

A plaintiff who wins a declaratory judgment may go on to seek further relief, even an action on the same claim which prompted the action for declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought; it is irrelevant that the further relief could have been requested initially. . . . Non-merger is justified by arguments based on the purpose of declaratory relief. A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that the declaratory might terminate the potential controversy. The idea that declaratory actions are to supplement rather than supersede other types of litigation is fortified by the provisions of the Uniform and Federal Acts for 'further relief' when necessary or proper;

these provisions represent a legislative scheme antithetical to merger. . . .

A plaintiff who has lost a declaratory action may also bring a subsequent action for other relief, subject to the constraint of the determination made in a declaratory action. The theory is the same; declaratory action determines only what it actually decides and does not have a preclusive effect on other contentions that might have been advanced. . . .

. . . [A]lso it can be persuasively urged that the declaratory plaintiff ought to be permitted to make a partial presentation of his side of the controversy, in the hope of preventing a full-blown claim from arising, without thereby losing his chance to pursue or defend that claim at a later time. Application of bar might also be undesirable because the risk of bar would discourage declaratory actions in the preclaim situation or at least discourage a possible useful even though partial presentation of the controversy.

However, if the claim has already accrued, refusal of bar or merger effects permit a claim to be split. Although it may be undesirable to allow declaratory proceedings

with regard to 'matured' ordinary causes of action, doing so is procedurably intelligible. Allowance of the declaratory remedy is discretionary, the court's exercise of discretion to allow a declaratory action when damages or injunction remedy could have been pursued can be viewed as an express reservation of all issues not included in the declaratory proceeding. Under rule Section 26(1)(b), the judgment is not preclusive as to issues so reserved.

A litigant seeking a declaratory remedy when he could have maintained a conventional action for coercive relief often signifies that he is in a quandry not only as to what his rights and duties are, but also as to how to secure their adjudication. Allowing peace meal litigation in such circumstances comparable to the option to 'split' recognized by Section 26(1)(e). As the opposing party can generally counter the effort to split either by objecting to the declaratory proceeding or by counterclaim in such a way, including a request for its own declaratory relief, as to get the whole controversy to terminate at once. In any event, the court whose discretion is invoked by declaratory action has means

> of preventing abuse. The court should lean toward declining the action if another remedy such as coercive action on the existent claim is plainly available and would have wider res judicata effects. . . . (Emphasis supplied.)

Section 33(c) of the Restatement (Second) of Judgments provides that Mandarino may be bound as to matters actually declared, but beyond those precise matters, any preclusion with respect to the termination of issues should not extend to the additional relief requested against the parties not mentioned in the declaratory action. Therefore, preclusion should not extend to Mandarino's federal liberty interest and other damage claims against any of the defendants named herein regardless of the municipality's limited involvement as the only adverse party in the prior State court proceeding. The Illinois Appellate Court expressly stated that

it did not consider Mandarino's liberty interest because the facts relating to it were *dehors* the record in the declaratory proceeding below. Mandarino v. Village of Lombard, 92 Ill.App. 3d 78, 414 N.E.2d 508, 511, 512 (1980).

In analyzing the declaratory judgment exception with respect to the instant case, the court of appeals emphasized the fact that as stated in the Restatement (Second) of Judgments, the declaratory judgment exception applies to cases in which the original claim was solely for declaratory relief. The court noted that Mandarino's original claim was in two counts and sought both declaratory relief and a preliminary injunction to maintain the *status quo*. The court concluded that since Mandarino's original claim was not solely for declaratory relief, the declaratory judgment exception did not apply; and the State court judgment

was entitled to the sweeping preclusive effect to which an ordinary claim for coercive relief would be entitled.

Contrary to the court of appeals analysis, the joinder of claims for declaratory relief and preliminary injunction does not destroy the limited preclusive effect a judgment on such claims should have. As already noted, the law is clear that a declaratory judgment has a limited preclusive effect on subsequent claims arising from the same set of operative facts. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 2d 491 (1969); St. John v. Wisconsin Employment Relations Board, 340 U.S. 411, 95 L.Ed. 396 (1951); Security Mutual Casualty Company v. Century Casualty Company, 621 F.2d (10th Cir. 1980); Curlott v. Campbell, 598 F.2d 1175 (9th Cir. 1979); Edward B. Marks Music Corp.

v. Charles K. Harris Music Pub. Co., 255 F.2d 518 (2nd Cir. 1958), cert. denied 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed. 2d 69 (1958); Kaspar Wire Corks, Inc. v. Leco Engineering & Mach., 575 F.2d 530 (5th Cir. 1978); Marshall v. Crotty, 185 F.2d 622 (1st Cir. 1950); State of Alabama v. Tennessee Valley Authority, 467 F.Supp. 791 (1979); Atchison v. City of Englewood, 506 P.2d 140 (S.Ct. Colo. 1973); Farley v. Missouri Department of Natural Resources, 592 S.W.2d 539 (Mo. App. 1979).

It is equally clear that under Illinois law, a request for preliminary injunction is only a request for provisional relief *pendente lite*. The function of a preliminary injunction is merely to freeze the *status quo*, i.e. the last peaceable, uncontested controversy between the parties which proceeded the pending

controversy until a decision on the merits on that pending controversy can be achieved. See City of Chicago v. Airline Canteen Service, Inc., 64 Ill.App. 3d 417, 380 N.E.2d 1106 (1978); Illinois Housing Development Authority v. Arbor Trails Development, 404 N.E.2d 1097 (1980); Wolf and Co. v. Waldron, 51 Ill.App. 3d 239, 366 N.E.2d 603 (1977). See also, Donald McElroy, Inc. v. Delaney, 389 N.E.2d 1300 (1979); Dolan v. United Cable Television Corporation, 422 N.E.2d 15 (1981); A.B.C. Trans. Nat., Etc. v. Aeronautic's Forwarders, 90 Ill.App. 3d 817, 413 N.E.2d 1299 (1980); O'Brien, Chancery Practice, Injunctions and Emergency Relief, 54 Chicago B. Rec. 21, 22 (1972). A ruling on a request for preliminary injunction does not operate as an adjudication on the merits. Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 Ill. 2d 723 (1939). Since it is

not an adjudication on the merits, a ruling on a request for a preliminary injunction is not *res judicata* as to subsequent claims arising from the same set of facts and it is entitled to no preclusive effect. A judgment for declaratory relief is a judgment on the merits, but its preclusive effect is limited only to the matters actually declared.

The court of appeals reasoned that a request for declaratory relief is entitled to a limited preclusive effect only where it is the only claim brought. Because Mandarino joined a claim for declaratory relief with a claim for preliminary injunctive relief, his claim was not solely for declaratory relief; and therefore, the declaratory judgment exception did not apply. As a result of this analysis, the court of appeals comes to the anomalous conclusion that when one claim for relief, which has

no preclusive effect (preliminary injunction), is joined with a second claim for relief, which has a limited preclusive effect (declaratory judgment), the nature of the claim is transformed and a judicial resolution of them is entitled to an all-encompassing preclusive effect. Certainly, it was error for the court to so conclude. A precise understanding of and an accurate application of the declaratory judgment exception to the circumstances of this case ought to produce a decision that a litigant involved in a declaratory judgment action in 1979 is not barred from bringing a subsequent action for coercive relief.

A correct understanding of the declaratory judgment exception was set forth in Lortz v. Connell, 78 Cal.Rptr. 6 (1969):

> . . . It is generally recognized that since coercive relief may or may not be requested in

> an action for declaratory relief a party will not be barred from seeking such relief by further proceedings in the same or a new action. . . .
>
> . . . The statutory purpose of the declaratory relief provisions is to permit a prompt adjudication of the respective rights and obligations of the parties in order to relieve them from uncertainty and insecurity with respect to rights, status, and other legal relations. (See Borchard, Declaratory Judgments (2nd ed. 1941) ch. IV, pp. 277-292.) The general rule referred to above, which does not bar the right to subsequent coercive relief if it is not sought or litigated in the earlier action, promotes this purpose. It enables a party to get a prompt adjudication without a dispute over the damages suffered. . . . (Emphasis supplied.)

Mandarino brought a limited State court action to declare his rights and to save his employment and career with the Village of Lombard. Prior to the court of appeal's decision, the declaratory judgment exception would have permitted him to do so without also seeking coercive

relief. Had Mandarino brought all of his claims for coercive relief at that time, his relationship with his employer would have been destroyed. Instead, in an attempt to save his employment, he brought an action, not for damages, but for limited non-coercive relief. He sought to limit the extensiveness of his claim and perhaps limit the amount of litigation needed to remedy the wrong he suffered. By ruling that Mandarino's subsequent claims were barred by *res judicata*, the Court of Appeals has created the added anomaly of applying the doctrine of *res judicata* in a situation which will have the impact of increasing the amount of litigation. In the future, a litigant will be able to limit the extent of his lawsuit to declaratory relief, only at great and ultimately unacceptable risk. He will be forced to join all claims for coercive relief

with his claims for declaratory relief and in this way destroy the unique purpose of declaratory relief.

The court of appeal's decision significantly expands the doctrine of *res judicata*. Under the particular circumstances of this case, Mandarino did not have a full and extensive treatment of his distinct claim regarding his liberty interest prior to the institution of this proceeding. As this Supreme Court of the United States noted in Kremer v. Chemical Construction Corp., 102 S.Ct. 1883 at 1897 (1982):

> . . . we have previously recognized that the judicially created doctrine of *collateral estoppel* does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity to litigate the claim or issue', Allen v. McCurrey, 449 U.S. at 95, 101 S.Ct. at 415; Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed. 2d 210 (1979);

> Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-43, 28 L.Ed. 2d 788. 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or failure of the procedures followed in the prior litigation.' Montana v. United States, 440 U.S. at 164 n. 11, 99 S.Ct. at 979 n. 11; C. F. Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973). (Emphasis supplied.)

In the federal court action, the redetermination of issues is not what was primarily sought but rather an initial determination of issues timely brought but not involved in the State court due to the lack of extensiveness of the State declaratory proceeding. See also, Wozniak v. County of DuPage, 569 F.Supp. 813 (N.D. Ill. 1983).

Having erroneously concluded that the declaratory judgment exception did not apply in the instant case, the Seventh Circuit Court of Appeals compounded

its error by applying federal preclusion law to determine whether the State court judgment barred a subsequent federal claim. In applying what it referred to as traditional *res judicata* principles, the court of appeals relief upon its most recent case setting for those principles: Lee v. City of Peoria, 685 F.2d 196 (7th Cir. 1982).

The court of appeal's application of federal preclusion law is contrary to this Court's recent decision in Migra v. Warren City School District Board of Education, ____ U.S. ____, 104 S.Ct. 892 (1984). In Migra, this Court stated, consistent with its prior decisions, that in claims brought pursuant to 42 U.S.C. Section 1983, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment

was rendered", ____ U.S. at ____, 104 S.Ct. at 896. In order to abide by this Court's dictates, the federal court must apply the preclusion law of the State. Here, the Court of Appeals, in relying on Lee v. City of Peoria, supra, failed to apply State preclusion law, and contrary to the teachings of this Court, applied its own newly created federal preclusion standards.

Under Lee v. City of Peoria, "*[r]es judicata* bars not only those issues which were actually decided in the prior action, but also any issues which could have been litigated". 685 F.2d 196, 198 (7th Cir. 1982).

Illinois, however, adheres to the rule that although resulting from the same acts, damage to different interests may infringe on different rights and therefore, can give rise to separate causes of action. Moreover, beyond

the exception, Illinois adheres to the principle that where a cause of action is different from that brought in a prior suit, the parties are bound not by issues which "could have been litigated" but only those that were actually litigated. City of Burbank v. Glazer, 76 Ill.App. 3d 294, 395 N.E.2d 97 (1979). See also, Industrial National Mortgage Co. v. City of Chicago, 95 Ill.App. 3d 666, 420 N.E.2d 581 (1981). Accordingly, under Illinois preclusion law, Mandarino's subsequent and separate damage claim would not have been barred.

With respect to waiver, the opinion of the court of appeals provided as follows:

> The appellees assert that the appellant's "declaratory judgment exception" argument was not raised in the district court and cannot be entertained for the first time on appeal. We agree. The principal thrust of the appellant's brief in the court below was that the

> right to a name-clearing hearing was not recognized at the time of his state court action and thus his federal action could not be barred by his earlier failure to assert that right. Nowhere in his brief was the declaratory judgment exception mentioned. Section 33 of the Restatement (Second) of Judgments was not cited; neither were the cases Mandarino relies on in this court to establish the "exception". Mandarino's isolated references in his brief below to the declaratory nature of the state court action were general in terms. They were not sufficient to alert the district court or the defendants to his reliance on a rarely encountered exception to traditional res judicata principles. We conclude that Mandarino's declaratory judgment exception argument was not presented to the court below.

Although Mandarino concedes that he did not use the term "declaratory judgment exception" (a phrase coined by Mandarino's counsel on appeal), in the district court, he does submit that the substance and theory of the "declaratory judgment exception" was

presented in the district court. A portion of the argument is contained in the following passage from Mandarino's memorandum filed in the district court:

> It is submitted that it was not unreasonable for Mandarino to have reserved any damage claim he might have wished to pursue, had he possessed one, until the outcome of an action simply confined to seek medical [sic] advice regarding protection of his employment relationship. Thus, practically speaking, to have attempted to sue for monetary damages rather than a declaration of rights would have irreconcilably put him at odds with his employer. Now, however, in light of his irreparable damage nothing can be gained by self-imposed restraint.

Mandarino submits that this reference, along with numerous others to the effect that a declaratory judgment is entitled to a limited preclusive effect, were sufficient to present this argument to the trial court for purposes of avoiding the harsh consequences of the waiver doctrine.

The doctrine of *res judicata* and waiver are common law doctrines devised by the court primarily for the purposes of judicial economy and concluding litigation. As the court noted, these doctrines can and must be relaxed where the ends of justice so require. Here, the court strained the application of these doctrines with the result that appellant will be precluded from his day in court. This result is contrary to the purposes of waiver and *res judicata* and operates to deny petitioner's attempt to obtain justice. This is especially so where a liberty interest is at stake. As was stated in Bartholomew v. Fischl, 534 F.Supp. 161 (E.D. Penn. 1981):

> ". . . normally, *res judicata* bars suits which raise issue which could have been adjudicated in earlier litigation. However, 'in order to give effect to the interest in providing a federal forum for . . . resolution of federal claims',

> Lehman v. Lycoming County Children's Services, 648 F.2d 135, 145 (3rd Cir. 1981) *(en banc)*, the Third Circuit has held that a 'State Court judgment forecloses a §1983 litigant from raising grievances in Federal Court only if such claims have been pressed before, and decided by, a State tribunal". New Jersey Education Ass'n. v. Burke, 579 F.2d 764, 774, (3rd Cir.), *cert. denied*, 439 U.S. 894, 99 S.Ct. 952, 58 L.Ed. 2d 239 (1978). Accord, Joseph L. v. Office of Judicial Support of the County of Common Pleas, 516 F.Supp. 1345 (E.D. Pa. 1981) (dismissing those portions of a §1983 suit which were actually litigated in the State Court actions. Accordingly, since the claims at bar were not raised in the prior State Court litigation, we will deny Defendants' Motion to Dismiss based upon the defense of *res judicata*.)" (Emphasis supplied.)

Bartholomew, like Mandarino, involved a liberty interest action, wherein certain relief had been sought in the State Court and *res judicata* had attempted to be invoked in a Section 1983 proceeding and is more closely in line with the facts at bar. Here, it is clear that

Mandarino's Section 1983 claim has never been "pressed" before, and "decided by a State tribunal" since, indeed, the State tribunal did not allow it to either be "pressed" or "decided".

It is also significant to note that the applicability of *res judicata* does not depend upon technicalities but on broad principles of justice. City of Burbank v. Glazer, 76 Ill.App. 3d 294, 395 N.E.2d 97 (1st Dist. 1979). The doctrine of *res judicata* should only be applied as fairness and justice require. Rotogravure Service, Inc. v. R. W. Arrowdale Company, 77 Ill.App. 3d 518, 395 N.E.2d 1145 (1979). The following comments from Judge Learned Hand and Judge Herbert Goodrich are appropos:

> ". . . it appears to us that the doctrine (of res judicata) . . . must be treated as a compromise between two conflicting interests; the convenience

> of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs."

Lyon v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2nd Cir. 1955).

> Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court.

United States v. Stillman, 167 F.2d 607, 614 (3rd Cir. 1948).

The Court of Appeals for the Seventh Circuit, due to its misapprehension of the declaratory judgment exception and erroneous and harsh application of the waiver doctrine, has deprived a litigant of a federal forum in which to present, for the first time, his federal, civil and constitutional claims. Such a result is contrary to the purpose for which the district court exists. Because of the significant deprivation

suffered by Mandarino and because of the importance of the implications of this decision for the administration of justice, review by this Court is required.

CONCLUSION

For the foregoing reasons, Petitioner, Joseph Mandarino, respectfully submits that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

BOTTI, MARINACCIO & MAKSYM, LTD.

BY: _____
Walter P. Maksym, Jr.

Aldo E. Botti
Walter P. Maksym, Jr.
Peter A. Monahan
BOTTI, MARINACCIO & MAKSYM, LTD.
Drake OakBrook Plaza
2211 York Road, Suite 208
Oak Brook, Illinois 60521
312/789-8585

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 8, 1983.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. MYRON L. GORDON, Senior District Judge*

JOSEPH MANDARINO, Plaintiff-Appellant, NO. 82-3109 VS. MARDYTH POLLARD, individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, individually and in his capacity as Village Manager of the Village of Lombard, Illinois, et al., Defendants-Appellants,	) Appeal from the United States District Court for the Eastern District of Illinois, Northern Division. No. 82 C 4380 Charles P. Kocoras Judge.

O R D E R

On consideration of the petition for

rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all of the judges on the original panel having voted to deny same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

Opinion by Judge Gordon.

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 7, 1983.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. MYRON L. GORDON, Senior District Judge*

JOSEPH MANDARINO, Plaintiff-Appellant, No. 82-3109 VS. MARDYTH POLLARD, etc., et al., Defendants-Appellees.	) Appeal from the) United States) District Court) for the Northern) District of) Illinois,) Eastern Division.)) No. 82-C-4380) Charles P. Kocoras,) Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Myron L. Gordon, Senior District Judge for the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 82-3109

JOSEPH MANDARINO,

Plaintiff-Appellant,

v.

MARDYTH POLLARD, Individually and in her Capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, Individually and in his Capacity as Village Manager of the Village of Lombard, Illinois; GREGORY YANGAS, Individually and as Trustee of the Village of Lombard, Illinois; WILLIAM FRANCIS, Individually and as Trustee of the Village of Lombard, Illinois; JOHN GARRITY, Individually and as Trustee of the Village of Lombard, Illinois; and THE VILLAGE OF LOMBARD, ILLINOIS, a Municipal Corporation and Governmental Subdivision of the State of Illinois,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Illinois
Northern Division
No. 82 C 4380 - CHARLES P. KOCORAS, *Judge*

ARGUED MAY 27, 1983 - DECIDED OCTOBER 7, 1983

Before WOOD and ESCHBACH, *Circuit Judges*, and GORDON, *Senior District Judge*.*

GORDON, *Senior District Judge*. Joseph Mandarino seeks review of a decision dismissing his complaint on the ground of res judicata. For the reasons stated below, we affirm the ruling of the district court.

I. FACTS

The appellant's basic grievance is his allegedly wrongful discharge as chief of police of the Village of Lombard, Illinois. He was hired for this position pursuant to section 2.40.020 of the Lombard Village Code, which states:

> The Village Manager is authorized to appoint, suspend or discharge the Chief of Police without the consent of the Board of Trustees.

Mandarino became chief of police in November, 1977; in June, 1979, the village manager gave him written notice of his termination, again pursuant to section 2.40.020 of the Village Code. The manager made no allegations of wrongdoing, but simply stated that Mandarino's

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* The Honorable Myron L. Gordon, Senior District Judge for the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

performance in his position had fallen short of the manager's expectations.

Mandarino asked to be informed of the specific reasons for his termination and requested a public hearing on the matter. Both requests were denied. He then brought suit against the Village of Lombard in the circuit court for DuPage County, Illinois. In this state court action Mandarino sought a declaratory judgment that he had been wrongfully terminated and that section 2.40.020 of the Lombard Village Code was contrary to Illinois law. The latter claim was based on Mandarino's contention that the local code conflicted with a state statute governing the hiring and firing of police chiefs and also that it violated the due process and equal protection clauses of the Illinois Constitution. The appellant's complaint in his state court action also included a second count, in which he requested a preliminary injunction enjoining the Village of Lombard from hiring anyone other than himself as its permanent chief of police.

Following a hearing, the Illinois circuit court granted the village's motion for judgment on the pleadings. Mandarino appealed this determination to the appellate court of Illinois, which affirmed the circuit court's judgment. *Mandarino v. Village of Lombard*, 92 Ill. App. 3d 78, 414 N.E.2d 508 (1980). Mandarino petitioned for leave to appeal this decision to the Illinois Supreme Court. His petition was denied.

Mandarino then brought the federal court action that is the subject of this appeal. In his complaint, he alleged that the circumstances of his discharge, particularly the failure to provide him with a name-clearing hearing, violated his civil rights under 42 U.S.C. Sections 1981, 1983, 1984, 1985 and 1988, as well as the first, fifth and fourteenth amendments to the United States Constitution. In addition to the Village of Lombard, the appellant named as defendants the village mayor, the village manager, and several trustees of the village board. These persons were sued in both their official and individual capacities. Along with his federal civil rights claims, Mandarino asserted two pendent state law claims, for interference with prospective economic advantage and wrongful discharge.

The defendants moved to dismiss the complaint on the basis that the earlier state court judgment barred Mandarino, under principles of res judicata, from pressing his claims in federal court. The district court granted the motion and dismissing the complaint. This appeal followed.

II. DECLARATORY JUDGMENT EXCEPTION

The appellant's principal argument in this court is that the earlier state court judgment is not res judicata because it was rendered in an action for declaratory relief. He bases this argument on the recognition, in Restatement (Second) of Judgments Section 33 (1982), of a

so-called "declaratory judgment exception" to the usual principles of res judicata. The Restatement rule provides that a declaratory judgment bars relitigation of issues actually decided but does not preclude a later action seeking coercive relief based on the same cause of action.

The appellees assert that the appellant's "declaratory judgment exception" argument was not raised in the district court and cannot be entertained for the first time on appeal. We agree. The principal thrust of the appellant's brief in the court below was that the right to a name-clearing hearing was not recognized at the time of his state court action and thus his federal action could not be barred by his earlier failure to assert that right. Nowhere in his brief was the declaratory judgment exception mentioned. Section 33 of the Restatement (Second) of Judgments was not cited; neither were the cases Mandarino relies on in this court to establish the "exception". Mandarino's isolated references in his brief below to the declaratory nature of the state court action were general in terms. They were not sufficient to alert the district court or the defendants to his reliance on a rarely encountered exception to traditional res judicata principles. We conclude that Mandarino's declaratory judgment exception argument was not presented to the court below.

Arguments not raised in the trial court cannot be raised for the first time on appeal. *See, e.g., Phillips v. Hunter Trails Community Association,*

685 F.2d 184 (7th Cir. 1982); *Textile Banking Co. v. Rentschler*, 657 F.2d 844 (7th Cir. 1981). Narrow exceptions to this rule have been recognized, as, for instance, where jurisdictional issues are involved or where, "in exceptional cases, justice demands more flexibility". *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). No jurisdictional issues are involved in the case at bar, and we know of no reason for justice to "demand more flexibility" in this case. Therefore, we conclude that the appellant's "declaratory judgment exception" argument is not properly before us on this appeal.

Even if we were to consider this argument, it would be of no avail to the appellant. Under 28 U.S.C. Section 1738, we must give the prior Illinois judgment entered in the appellant's declaratory judgment action the same preclusive effect as it would be afforded by Illinois courts. *Harl v. City of LaSalle*, 679 F.2d 123, 125 (7th Cir. 1982). Mandarino has cited no Illinois authority that stands for rule contained in section 33 of the Restatement (Second) of Judgments. The only case he refers to in direct support of Illinois adoption of the declaratory judgment exception is *LaSalle National Bank v. County of DuPage*, 77 Ill. App. 3d 562, 396 N.E.2d 48 (1979). Although that case did hold that a second suit was not precluded by a prior declaratory judgment, the rationale relied on by the court arose from the special characteristics of zoning

cases; no weight was given to the fact that the prior action had involved only a declaratory judgment.

Assuming, *arguendo*, that some controlling authority existed for application of the declaratory judgment exception in this circuit, Mandarino's reliance on that exception would still not aid him in this appeal. As stated in Restatement (Second) of Judgments, Section 33, comment c, the purpose of declaratory actions is to supplement other types of litigation by providing "a remedy that is simpler and less harsh than coercive relief". According to the Restatement, this purpose is furthered when a plaintiff who has sought "solely" declaratory relief is later permitted to seek additional, coercive relief based on the same claim.

Under this rationale, permitting Mandarino to proceed with his federal lawsuit would not further the purpose of declaratory actions, since his state court action did not seek "solely" declaratory relief. Instead, his request for a judicial declaration was coupled with a request for a preliminary injunction which, if granted, would have prevented the Village of Lombard from replacing him as police chief for the duration of the litigation. Under these circumstances, the policy underlying the declaratory judgment exception must give way to the policy underlying traditional res judicata principles, namely, "to protect defendants and the courts from a multiplicity of suits arising from the same cause of action". *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119, 121 (7th Cir. 1981).

We conclude that even if the rule stated in Restatement (Second) of Judgments governed resolution of this appeal, Mandarino's pursuit of injunctive relief in his state court action would remove him from the protections of the rule.

III. TRADITIONAL RES JUDICATA PRINCIPLES

The remaining issues on this appeal relate to the correctness of the district court's application of traditional res judicata principles in the circumstances of this case. We recently restated those principles in *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982).

> The doctrine of res judicata is that a final judgment on the merits in a court of competent jurisdiction bars the same parties or their privies from relitigating not only the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action. . . . The essential elements of the doctrine are generally stated to be (1) a final judgment on the merits of an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.

Id. at 199 (citations omitted).

The *Lee* case held that these principles of res judicata applied in the case of a federal civil rights action based on the same claim that had been decided in a prior state court proceeding. *Id.* Therefore, if the district court was correct in concluding that the elements of res judicata listed in *Lee* were met in the case at bar, the dismissal of this action must be affirmed.

The first element is a final judgment on the merits in an earlier action. In Mandarino's state court lawsuit, the circuit court for DuPage County granted the Village of Lombard's motion for judgment on the pleadings. Contrary to the appellant's assertion, this was a final judgment on the merits, as defined in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981). The existence of a judgment on the merits denying the appellant's request for declaratory relief makes irrelevant his argument in this court that the grant or denial of a preliminary injunction is not a judgment on the merits.

The appellant argues that the existence of a prior judgment on the merits had not been established because the appellees failed to place on the record the Illinois circuit court judgment granting the Village of Lombard's motion for judgment on the pleadings. This argument borders on the frivolous when it is considered that (1) Mandarino's own complaint acknowledges that his action in Illinois circuit court "resulted in a dismissal of his Complaint for Declaratory Relief", and (2) Mandarino's

counsel admitted the existence of the judgment at oral argument. Whatever slight weight the appellant's technical argument might have had is completely dispelled by this court's ability judicially to notice the circuit court judgment. *E.g.*, *Barrett v. Baylor*, 457 F.2d 119 (7th Cir. 1972); *Wagner v. Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962); *United States v. Bleasby*, 257 F.2d 278 (3d Cir. 1958). Such notice is hereby taken.

The district court was clearly correct in determining that a prior judgment on the merits exists. The court was also correct in its conclusion that the second element of res judicata set out in *Lee*, an identity of causes of action between the earlier and later suits, is present. The test for deciding whether there is one cause of action was described in *Lee* as follows:

> "[A] cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the alleged different causes of action asserted. . . ."

685 F.2d at 200, quoting *Morris v. Union Oil Co. of California*, 96 Ill. App. 3d 148, 421 N.E.2d 278, 285 (1981).

The court in *Lee* concluded, with regard to the circumstances of that case, that "[b]oth the state proceedings and this suit arose from the same set of operative facts and the validity of Lee's discharge is crucial to both". *Id.* A similar conclusion is justified in the case at bar. The "operative facts" underlying Mandarino's state court action consisted of his termination as police chief and the circumstances surrounding that termination. The same operative facts are involved in his action in federal court. That he now advances a different legal theory and seeks additional forms of relief does not alter the identity of the cause of action in his federal and state suits. *See, e.g., Rosenthal v. Nevada*, 514 F. Supp. 907 (D. Nev. 1981).

The third element of res judicata listed in *Lee* is an identity of parties or their privies in the earlier and later suits. The defendant in the appellant's state court suit was the Village of Lombard. The defendants in his federal action include, in addition, the village mayor, the village manager, and several trustees of the village. The government and its officers are in privity for purposes of res judicata. *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 402 (1939); *Church of the New Song v. Establishment of Religion*, 620 F.2d 648 (7th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); *Consolidated Distilled Products v. Allphin, Inc.*, 73 Ill. 2d

19, 382 N.E.2d 217 (1978); *City of Elmhurst v. Kegerreis*, 392 Ill. 195, 64 N.E.2d 450 (1946). *See also Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976). The district court correctly concluded that the individual defendants in Mandarino's federal action are in privity with the Village of Lombard, the defendant in his state court action. The third element of res judicata set out in *Lee* is therefore present.

The elements of res judicata having been established, the appellant is barred from relitigating not only the issues that were actually decided in his earlier state court action but also all other issues that could have been decided in that action. *Lee*, 685 F.2d at 199. In the district court, Mandarino argued that one of his federal claims, the right to a name-clearing hearing, could not have been raised in the state court because such a right was not recognized at the time of his state court action. He asserted that his federal action was therefore not barred as to this claim. Mandarino appears to have abandoned this contention on appeal, so we need not address it, other than to note that the district court properly resolved this issue against the appellant.

All of the issues raised by the first count of Mandarino's federal complaint could have been raised and decided in his earlier state court action. The district court was therefore correct in dismissing this count on the basis of res judicata. The two pendent state law claims were also properly dismissed for lack of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

For the foregoing reasons the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Charles P. Kocoras

Cause No. 82 C 4380 Date November 30, 1982

Title of Cause Mandarino -v- Pollard et al

Brief Statement
of Motion Memorandum Opinion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and
Addresses of
moving counsel _____

_____

Representing _____

Names and
Addresses of
other counsel
entitled to
notice and names
of parties they
represent. _____

_____

_____

_____

Reserve space below for notations
by minute clerk

Enter Memorandum Opinion: Defendants' motion to dismiss the complaint in its entirety is granted (See DRAFT for particulars).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH MANDARINO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARDYTH POLLARD, Individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, Individually and in his capacity as Village Manager of the Village of Lombard, Illinois; GREGORY YANGAS, Individually and as Trustee of the Village of Lombard, Illinois; WILLIAM FRANCIS, Individually and as Trustee of the Village of Lombard, Illinois; JOHN GARRITY, Individually and as Trustee of the Village of Lombard, Illinois; and THE VILLAGE OF LOMBARD, ILLINOIS, a municipal corporation and governmental subdivision of the State of Illinois,	)	No. 82 C 4380
	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Plaintiff, Joseph Mandarino, was hired as chief of police of the Village

of Lombard, Illinois on November 28, 1977, pursuant to section 2.40.020 of the Lombard Village Code which provides in pertinent part:

> The Village Manager is authorized to appoint, suspend or discharge the Chief of Police without the consent of the Board of Trustees.

On June 11, 1979, acting under the same section of the village code, the village manager gave plaintiff written notice terminating his employment as chief of police. No charges of wrongdoing were made against plaintiff; he was simply informed by the village manager that his performance as chief had not measured up to the village manager's expectations.

Plaintiff subsequently requested of the village manager that he be informed of the specific reasons for his termination and that he be provided with a public hearing on the matter. These requests were denied, and on September 11, 1979,

plaintiff brought suit against the Village of Lombard in the Circuit Court of DuPage County Illinois. In this state court lawsuit, plaintiff sought a declaratory judgment that he had been wrongfully terminated and that the village ordinance under which he had been terminated was contrary to Illinois law in that it conflicted with a state statute governing the hiring and firing of police chiefs and violated the due process and equal protection clauses of the Illinois Constitution.

Following a hearing on January 9, 1980, the Circuit Court of DuPage County granted the Village of Lombard's motion for judgment on the pleadings. Plaintiff appealed this adverse judgment of the trial court to the Appellate Court of Illinois, and on December 17, 1980, that court affirmed the lower court's judgment

in a published opinion. Mandarino v. Village of Lombard, 92 Ill. App.3d 78, 414 N.E.2d 508 (2d Dist. 1980). Plaintiff then filed a petition for leave to appeal the appellate court's decision to the Illinois Supreme Court. After consideration of this petition, the Illinois Supreme Court declined to hear plaintiff's appeal.

Having found no succor in the Illinois court system, plaintiff has now turned to the federal courts. In his complaint, filed in July of 1982, plaintiff alleges that his termination as chief of police violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1984, 1985, and 1988, as well as the First, Fifth, and Fourteenth Amendments to the United States Constitution. Named as defendants in plaintiff's federal action are the Villge [sic] of Lombard and several of its officials, including the mayor, the village manager, and three

trustees of the village board. These village officials were in privity with the village when plaintiff filed his action in state court, but they were not named as defendants in that action. In addition to his federal civil rights claims, plaintiff asserts pendent claims under state law for wrongful discharge and interference with prospective economic advantage.

The matter now before the court is the defendants' motion to dismiss the complaint in its entirety. According to the defendants, Count I, containing plaintiff's federal civil rights claims, fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal of this count, defendants urge, mandates dismissal of the remaining counts for lack of pendent jurisdiction.

In support of their motion to dismiss plaintiff's federal civil rights claims,

defendants argue that plaintiff had ample opportunity to raise those claims in his 1979 lawsuit in state court. Since plaintiff could have asserted his civil rights claims in state court but failed to do so, defendants argue that the matter is res judicata, thus precluding plaintiff's attempt to raise those claims now in this court.

Plaintiff begins his response to this argument with the observation that res judicata is normally raised in the answer as an affirmative defense. Having made this observation, however, plaintiff states that he will "directly confront Defendants' unusual attempt" to utilize res judicata as a ground for dismissal under Fed. R. Civ. P. 12 (b)(6). Plaintiff's Mem. in Opposition at 1. Plaintiff is correct in noting that under Fed. R. Civ. P. 8(c), res judicata is an affirma-

tive defense which ordinarily must be raised in a responsive pleading. But, in a case such as this one, where the allegations of the complaint clearly reveal the existence of a possible affirmative defense, the complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6). See, e.g., Lambert v. Conrad, 536 F.2d 1183, 1186 (7th Cir. 1976); Iacaponi v. New Amsterdam Casualty Company, 379 F.2d 311, 312 (3d Cir.), cert. denied, 389 U.S. 1054, 88 S.Ct. 802 (1967); Williams v. Murdoch, 330 F.2d 745, 749 (3d Cir. 1964); Wright & Miller, Federal Practice and Procedure: Civil §§ 1357, 1360. Plaintiff is therefore on sound footing in electing to "confront" the merits of defendants' res judicata argument.

Turning to the merits of defendants' argument, plaintiff maintains that his civil rights claims are not barred by

the doctrine of res judicata because he never had an opportunity to assert such claims in state court. This was so, according to plaintiff, because the civil rights claims which he is now asserting in this court did not exist until 1980 when the United States Supreme Court decided Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398. Therefore, plaintiff contends, he had no civil rights claims that he could have raised in the state trial court in 1979. And, plaintiff charges, once he did acquire viable civil rights claims following the decision in Owen, the higher courts of Illinois abrogated his rights when they refused to let him amend his complaint to assert the new claims which he says were authorized by Owen. In plaintiff's view, "[t]he Illinois Courts did not vigilantly protect nor recognize Plaintiff's constitutional

rights to the same degree which a federal court would have responded [sic]." Complaint, Count I par. 30. Thus, the first question in deciding this motion is whether plaintiff is correct in his assertion that the Supreme Court's decision in Owen created for him new civil rights claims which he could not previously have asserted in the state court.

Of the host of civil rights claims asserted by plaintiff, the only claims which are in contention as ones which he was incapable of asserting prior to the Owen decision are those involving a constitutionally protected "liberty" interest in his professional reputation. Plaintiff's theory is that certain conduct by the defendants attached a stigma to his name which, when coupled with his termination and the failure to accord him a hearing, foreclosed his freedom

to take advantage of other job opportunities. According to plaintiff, this action constituted a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment. And, plaintiff maintains, a claim for relief for a constitutional deprivation of this nature was "'unknown' at the time that his [state court] action was filed and . . . was only borne [sic] as a result of the landmark pronouncement by the United States Supreme Court in Owens [sic]." Plaintiff's Mem. in Opposition at 7-8.

This statement misapprehends the import of the Supreme Court's decision in Owen. The Court did not establish the right to a name-clearing hearing for the first time in Owen. That right was already well established in the law by the time Owen was decided. 1/ This

was recognized by the Eighth Circuit Court of Appeals in the Owen case in 1978 when it stated:

> The Supreme Court's decision in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge.

589 F.2d 335, 338 (8th Cir. 1978), quoted at 445 U.S. 622, 634, 100 S.Ct. 1398, 1407. Having thus recognized the existing state of the law, the Eighth Circuit ruled that the plaintiff, a former chief of police, had been deprived of his constitutional right to liberty when his reputation was stigmatized in conjunction with his discharge from public employment and he was not provided with a hearing to vindicate his name.

When the Supreme Court reviewed the Eighth Circuit's decision in 1980, it was not concerned with breaking new ground on the question of the due procees [sic] right of governmental employees to a name-clearing hearing. 2/ The only controversy in Owen arose out of the decision of the Eighth Circuit that, although the plaintiff had stated a claim under established principles, it was nevertheless proper under the facts of the case to shield the defendant municipality from liability for its constitutional violation under the doctrine of qualified immunity. The court of appeals believed this result to be appropriate under the particular facts of the Owen case because the plaintiff's discharge had occurred in 1972, two months before the Supreme Court's decisions in Roth and Perry made it clear that

the plaintiff had the right to a name-clearing hearing.

The sole focus of the Supreme Court's opinion in Owen was on this controversy. The Court's object in granting certiorari was to address the important question, which had caused a split in the circuits, of whether municipal defendants should be accorded qualified immunity from liability for claims under section 1983. And, in holding that municipalities are not entitled to such immunity, the Court did not thereby create a new claim for relief which had not previously existed. Instead, the Court merely abolished one line of defense that had previously been available under some circumstances to municipal defendants in section 1983 actions in some of the federal circuits. 3/

Plaintiff's assertion that his claim based upon the denial of a name-clearing

hearing was "unknown" in 1979 may be correct insofar as his counsel is concerned. Such a claim, however, was well established in the law by 1979, and there is no reason that plaintiff could not have made such a claim in the Circuit Court of DuPage County in his 1979 lawsuit. 4/

Having concluded that Owen did not create a new claim for relief and that plaintiff could have raised his "liberty" interest claims in the state trial court in 1979, the next question is whether the doctrine of res judicata bars plaintiff from asserting those claims now in an action in this court.

Res judicata means that

> [a] judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain

> or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. In other words, [the party] must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense, and cannot bring a new suit to recover something more on the same cause of action.

Liddel v. Smith, 345 F.2d 491, 493 (7th Cir. 1965) (emphasis added). Accord Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939, 945 (7th Cir. 1981); Conlan v. Monumental Corp., 524 F.Supp. 1023, 1024 (N.D. Ill. 1981). See generally Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978). It is, therefore, fundamental that "res judicata bars not only the claims that a party actually made in the first suit but also the claims he could have made on the basis of the facts that he alleged in that suit." Marresse

v. American Academy of Orthopaedic Surgeons, No. 81-2671, slip op. at 8 (7th Cir. Nov. 4, 1982) (Posner, J.). "A plaintiff may not split his cause of action by bringing a suit on one theory and then, after he has lost, trying again on a different theory." Id. "'Cause of action' in this context is simply the set of facts that establishes a right to relief under any theory that the plaintiff could have asserted in his first suit." Id.

The Seventh Circuit recently concluded that traditional res judicata principles are fully applicable to actions brought under section 1983. In Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982), the court stated, "We . . . reaffirm this court's pre-Allen opinion in Blanker v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1678, 44 L.Ed.2d 101 (1975),

applying res judicata in a civil rights action to bar a suit even as to issues which could have been, but were not, litigated in a prior state proceeding."

In an effort to avoid the bar of res judicata, plaintiff makes a rather feeble attempt to argue that this lawsuit involves a different cause of action than his prior state proceedings, saying that he "did not have a realistic right to claim a violation of his liberty interest until the opinion in Owens [sic] was handed down." Plaintiff's Mem. in Opposition at 14. As discussed above, this interpretation of the Owen case is not supported by anything in the Supreme Court's opinion. The standard test for determining whether there is a single cause of action was set forth by the Seventh Circuit in Lee, supra:

> [A] cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon diffrent [sic] theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and res judicata bars the latter [action].

685 F.2d at 200 (quoting Morris v. Union Oil Company of California, 96 Ill. App.3d 148, 421 N.E. 2d 278, 285 (1981)).

Applying this test to plaintiff's situation, it is clear that both this action and his state court lawsuit arose from a single core of operative facts. That set of facts, which provides the foundation for both of plaintiff's suits, consists of his termination as chief of police and the circumstances surrounding that termination. The theory relied

upon by plaintiff in the state court obviously is different from the one relied upon in this court. But the underlying cause of action is the same in both instances. In this action plaintiff merely advances a different theory for recovery upon the same cause of action which was the subject of previous litigation in the state court. See Bennum v. Board of Governors of Rutgers, 413 F.Supp. 1274, 1278 (D.N.J. (1976).

Plaintiff also attempts to avoid the effects of res judicata by suggesting that the individual defendants in this action are not in privity with the village, which was the defendant in his state lawsuit. In this connection, plaintiff argues:

> Here, THE VILLAGE'S co-defendants, especially in their individual capacity, would not have lost anything or gained anything through the operation of a judgment in the State Court

> proceeding, did not participate in it, were not necessary parties, and, therefore, were not in privity with THE VILLAGE. Further, no showing of prejudice has been made as to any defendant.

Plaintiff's Mem. in Opposition at 16.

In addition, plaintiff attempts to differentiate this action from that in the state court on the ground that he is seeking a different remedy in this action. As plaintiff explains this point:

> It is submitted that it was not unreasonable for Mandarino to have reserved any damage claim he might have wished to pursue, had he possessed one, until the outcome of an action simply confined to seek medical [sic] advice regarding protection of his employment relationship. Thus, practically speaking, to have attempted to sue for monetary damages rather than a declaration of rights would have irreconcilably put him at odds with his employer. Now, however, in light of his irreparable damage nothing can be gained by self-imposed restraint.

Id. at 20 n.11

These argument are not persuasive. In a case much like this one, where a plaintiff brought a section 1983 action for damages in federal court after having lost in his suit for declaratory and injunctive relief in the state trial court, the federal district court declared:

> Where a federal constitutional claim is based on the same asserted wrong as was the subject of a state action, res judicata will bar the federal constitutional claim whether it was asserted in state court or not. The reason is that the state judgment on the merits serves not only to bar every claim that was raised in state court but, also, to preclude the assertion of every legal theory or ground for recovery that might have been raised in state court supporting the granting of the desired relief. . . . The fact that a different or additional form of relief is requested in the second action does not preclude the application of res judicata. . . . Furthermore, the bringing in of additional parties in the second suit that contributed to the same alleged wrong in

he [sic] first suit does not violate the requirement for identity of the parties in the application of the doctrine of res judicata. Also, the pleading of additional facts to show an aggravation of the alleged harm in the second suit does not alter the existence of the same facts essential to the two suits. . . . To do otherwise would allow the plaintiff to fragment a single cause of action and to litigate piecemeal the issues which could have been litigated in one action. . . .

The plaintiff should have asserted his damage claim pursuant to Title 42 U.S.C. §1983 in the state court action. The pleading of additional facts showing an aggravation of the harm, the addition of certain members and former members of the Nevada Gaming Commission and the State Gaming Control Board, and the prayer for damages in the federal court action does not alter the rule. This Court believes that the doctrine of res judicata precludes the plaintiff from pursuing his claim under Title 42 U.S.C §1983 in this case.

Rosenthal v. State of Nevada, 514 F.Supp. 907, 912 (D.Nev. 1981) (citations omitted). See also Lee v. City of Peoria, supra at 199-200 n.4; Lambert v. Conrad, 536 F.2d 1183, 1185-86 (7th Cir. 1976). This reasoning is sound, and it applies with equal force in this case.

After a thorough evaluation of the foregoing authorities, it is apparent that plaintiff's failure to bring his civil rights claims in his 1979 state court lawsuit, when he readily could have done so, bars him from now litigating those claims in this court. The policy behind the doctrine of res judicata is "to protect defendants and the courts from a multiplicity of suits arising from the same cause of action." Gasbarra v. Park-Ohio Industries, 655 F.2d 119, 121 (7th Cir. 1981). This policy would not be well served by permitting plaintiff

to split his cause of action and have a second trial now on claims which he should have asserted in the state court three years ago. Despite plaintiff's shrill protestation that the defendants are seeking to "cunningly lump themselves under the skirts of res judicata," Plaintiff's Mem. in Opposition at 5, the defense of res judicata is a valid one in this case, and the defendants have properly asserted it. Plaintiff has had his day in court, 5/ and he is not entitled to another one under the circumstances of this case.

Accordingly, Count I is dismissed for failure to state a claim upon which relief can be granted. Fed.R. Civ. P. 12(b)(6). Counts II and III are dismissed for lack of pendent jurisdiction. Fed. R. Civ. P. 12(b)(1); United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966).

For the foregoing reasons, the motion of defendants to dismiss the complaint in its entirety is granted.

Charles P. Kocoras
United States District Judge

Dated: November 30, 1982

1/ See, e.g., Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976), cert. denied, 430 U.S. 960, 97 S.Ct. 1610 (1977) in which the Seventh Circuit stated the following test of whether a "liberty" interest has been infringed in an employment context:

> [S]tigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving a deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found in conjunction state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process.

Id. at 973 (emphasis in original). This case was decided three years prior to the time plaintiff in the instant case filed his lawsuit in state court. Even modest research on the subject would have disclosed its existence to him. An even rudimentary analysis would have made apparent the obvious applicability of the foregoing princple [sic] to his situation. Moreover, even if plaintiff's counsel, in researching his case prior to filing suit in 1979, had somehow missed the Colaizzi case, there was still an abundance of other authorities which supported plaintiff's "liberty" interest claim at that time.

As another district court recently observed in reviewing this area of the law:

> Numerous cases subsequent to Roth have held that a public employee who is discharged amidst allegations of dishonesty or immorality is entitled to a hearing, assuming the employee can demonstrate that those allegations had some stigmatizing effect. . . . Similarly, courts have suggested that due process requires a hearing where an employee is discharged in the wake of stigmatizing charges of fraud, dishonesty in conducting financial affairs, untruthfulness, mental illness, racism, felonious conduct, and moral unfitness and distribution of pornography.

Huff v. County of Butler, 524 F.Supp. 751, 754 (W.D. Pa. 1981) (citations and footnotes omitted). Of the dozen different cases cited by the court in this passage, ten have been decided at least two years before plaintiff's 1979 lawsuit. Plaintiff's assertion that his claim for denial of a name-clearing hearing was "unknown" in 1979 can, therefore, only be viewed as apocryphal.

2/ The Court touched upon the subject only tangentially, noting in one of the 41 footnotes in the majority opinion that it was rejecting what it termed a "belated challenge" to the Eighth

Circuit's ruling that the plaintiff had been deprived of a protected "liberty" interest and was therefore declining to disturb the lower court's well founded conclusion on this point. 445 U.S. at 633 n.13, 100 S.Ct. at 1406 n.13.

This lone footnote to the Court's opinion can hardly support plaintiff's interpretation of Owen as a case which is a landmark because of its formulation of a theretofore "unknown" claim for relief. The text of the footnote, brief though it is, belies such a conclusion. In addition to its observation that the Eighth Circuit's 1978 ruling on the "liberty" interest issue was correct, the Supreme Court cited three of its own earlier decisions, all issued before 1979, which solidified the right of governmental employees to claim relief for the denial of a name-clearing hearing.

3/ It is noteworthy that the defense of qualified immunity based on the good faith of its officials apparently would not have been available to the Village of Lombard in the Seventh Circuit in 1979. According to the Supreme Court, the Seventh Circuit was one of several courts of appeals which had already decided not to extend such immunity to local governmental entities at the time Owen was decided. 445 U.S. 622, 635 n.15, 100 S.Ct. 1398, 1407 n.15 (1980) (citing Hostrop v. Board of Junion College Dist. 515, 523 F.2d 569 (7th Cir. 1975)). Thus, not only could plaintiff have asserted his section 1983 claim in the state trial court in 1979, but if the defendant village had attempted to interpose a defense of qualified immunity, plaintiff could

have argued to the court that such a defense was not available in the federal circuit in which it was located.

Since the Seventh Circuit had already refused to recognize the defense five years before Owen was decided, Owen's abolition of the defense had no impact in this circuit other than to reaffirm what had previously been established as the law. It is, therefore, rather disingenuous of plaintiff to argue as he does that "during the entire pendency of his action [in the Illinois trial court,] a [section 1983] claim against THE VILLAGE would have been futile due to the controllng [sic] pronouncements of [the Eighth Circuit]." Plaintiff's Mem. in Opposition at 4. Even assuming the correctness of the dubious proposition advanced by plaintiff that the existence of a potential defense may be equated with the nonexistence of a claim, the Illinois trial court would hardly have been receptive to the suggestion that it was "controll[ed]" by the law of the Eighth Circuit where that law was in conflict with the law of the Seventh Circuit, in which Illinois is located.

4/ It is settled that state courts exercise concurrent jurisdiction with the federal district courts over actions arising under 42 U.S.C. §1983. E.g., Rosenthal v. State of Nevada, 514 F.Supp. 907, 911, n.4 (D. Nev. 1981) (citing twelve cases to the same effect). The Illinois courts have expressly held that they have such concurrent jurisdiction. Alterty v. Daniel, 25 Ill. App.3d 291, 323 N.E.2d 110 (1974). And, in a recent

case in this district, the court concluded that under the Illinois Supreme Court's construction of the supremacy clause of the Constitution, Illinois courts are obligated to hear cases based on section 1983. North American Cold Storage Co. v. County of Cook, 531 F.Supp. 1003, 1007-08 n.5 (N.D. Ill. 1982). The reasoning employed in reaching this conclusion would have been equally sound had the question arisen in 1979 when plaintiff brought his lawsuit in the Illinois trial court.

5/ Plaintiff goes to some extremes to vilify the Illinois courts in an effort to demonstrate that he has not previously had an opportunity to litigate his federal claims. For example, plaintiff states that "there is reason to doubt the quality, extensiveness, fairness and procedures followed in the State litigation." Plaintiff's Mem. in Opposition at 10. Plaintiff goes on in this strident vein to declare:

> The Appellate Court of Illinois, Second Judicial District, not only ignored the pronouncement of Owens [sic], but totally failed to cite or deal with it in its published opinion. . . . In its opinion, the [appellate cout] somehow concluded that a home rule municipality can supercede the Constitution and laws of the United States of America.

Id. at 11.

This characterization of the appellate court's conclusion in the Mandarino case is reprehensible. The court reached no such conclusion. Instead, the court was apparently as unconvinced as this court by plaintiff's patently flawed interpretation of Owen as creating a new claim which he could not have asserted in the trial court. The appellate court properly refused to entertain plaintiff's "liberty" interest claim because it was made for the first time on appeal. Mandarino v. Village of Lombard, 92 Ill. App.3d 78, 414 N.E.2d 508 (1980). Thus, the only basis for plaintiff's assertions of unfairness in the Illinois courts is the refusal of those courts to accept his misrepresentation of the holding of a Supreme Court decision so as to allow him to raise a claim on appeal which he had foregone in the court below.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 8, 1983.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. MYRON L. GORDON, Senior District Judge*

JOSEPH MANDARINO, Plaintiff-Appellant, NO. 82-3109 VS. MARDYTH POLLARD, individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, individually and in his capacity as Village Manager of the Village of Lombard, Illinois, et al., Defendants-Appellants,	) Appeal from the United States District Court for the Eastern District of Illinois, Northern Division. No. 82 C 4380 Charles P. Kocoras Judge.

O R D E R

On consideration of the petition for

rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all of the judges on the original panel having voted to deny same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

Opinion by Judge Gordon.

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 7, 1983.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. MYRON L. GORDON, Senior District Judge*

JOSEPH MANDARINO, Plaintiff-Appellant, No. 82-3109 VS. MARDYTH POLLARD, etc., et al., Defendants-Appellees.	) Appeal from the) United States) District Court) for the Northern) District of) Illinois,) Eastern Division.)) No. 82-C-4380) Charles P. Kocoras, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

No. 83-2021

In The

Supreme Court of the United States

October Term, 1983

JOSEPH MANDARINO,

Petitioner,

vs.

MARDYTH POLLARD, Individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, Individually and in his capacity as Village Manager of the Village of Lombard, Illinois; GREGORY YANGAS, Individually and as Trustee of the Village of Lombard, Illinois; WILLIAM FRANCIS, Individually and as Trustee of the Village of Lombard, Illinois; JOHN GARRITY, Individually and as Trustee of the Village of Lombard, Illinois; and THE VILLAGE OF LOMBARD, ILLINOIS, a municipal corporation and governmental subdivision of the State of Illinois.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SARAH HANSEN SOTOS
JUDGE & KNIGHT, LTD.
422 North Northwest Highway
Park Ridge, Illinois 60068
(312) 696-2810

PATRICK A. LUCANSKY
KLEIN, THORPE & JENKINS, LTD.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 984-6400

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, MARDYTH POLLARD, WARREN BROWNING, GREGORY YANGAS, WILLIAM FRANCIS, JOHN GARRITY, and THE VILLAGE OF LOMBARD, respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 7, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 718 F.2d 845 (7th Cir. 1983) and appears in Petitioner's Appendix at pages 1a-11a. The unpublished Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, appears in Petitioner's Appendix at pages 13a-31a.

———o———

RESPONDENTS' STATEMENT OF THE CASE

The facts material to the consideration of the questions presented in the Petition are drawn from Petitioner's Complaint. Those facts, which are merely allegations at this stage of litigation, and which must be taken as true for the purpose of ruling on Respondents' motions to dismiss Petitioner's Complaint, were set forth by the Court of Appeals as follows:

> "The appellant's basic grievance is his allegedly wrongful discharge as chief of police of the Village of Lombard, Illinois. He was hired for this position pursuant to Section 2.40.020 of the Lombard Village Code, which states:
>
> > The Village Manager is authorized to appoint, suspend or discharge the Chief of Police without the consent of the Board of Trustees.
>
> Mandarino became chief of police in November, 1977; in June, 1979, the village manager gave him written notice of his termination, again pursuant to section 2.40.020 of the Village Code. The manager made no allegations of wrongdoing, but simply stated that

Mandarino's performance in his position had fallen short of the manager's expectations.

Mandarino asked to be informed of the specific reasons for his termination and requested a public hearing on the matter. Both requests were denied. He then brought suit against the Village of Lombard in the circuit court for DuPage County, Illinois. In this state court action Mandarino sought a declaratory judgment that he had been wrongfully terminated and that section 2.40.020 of the Lombard Village Code was contrary to Illinois law. The latter claim was based on Mandarino's contention that the local code conflicted with a state statute governing the hiring and firing of police chiefs and also that it violated the due process and equal protection clauses of the Illinois Constitution. The appellant's complaint in his state court action also included a second count, in which he requested a preliminary injunction enjoining the Village of Lombard from hiring anyone other than himself as its permanent chief of police.

Following a hearing, the Illinois circuit court granted the village's motion for judgment on the pleadings. Mandarino appealed this determination to the appellate court of Illinos, which affirmed the circuit court's judgment. *Mandarino v. Village of Lombard,* 92 Ill. App.3d 78, 414 N.E.2d 508 (1980). Mandarino petitioned for leave to appeal this decision to the Illinois Supreme Court. His petition was denied.

Mandarino then brought the federal court action that is the subject of this appeal. In his complaint, he alleged that the circumstances of his discharge, particularly the failure to provide him with a name-clearing hearing, violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1984, 1985 and 1988, as well as the first, fifth, and fourteenth amendments to the United States Constitution. In addition to the Village of Lombard, the appellant named as defendants the village mayor, the village manager, and several trustees of the village board. These persons were sued in both their

> official and individual capacities. Along with his federal civil rights claims, Mandarino asserted two pendent state law claims, for interference with prospective economic advantage and wrongful discharge.
>
> The defendants moved to dismiss the complaint on the basis that the earlier state court judgment barred Mandarino, under principles of *res judicata,* from pressing his claims in federal court. The district court granted the motion and dismissed the complaint. This appeal followed.

Mandarino, supra, 718 F.2d at 847; Petitioner's Appendix at 4a-5a.

Petitioner's reference to the basis of the holding of the Court of Appeals, set forth in his Statement of the Case, requires clarification. The Court of Appeals found that, since Mandarino had not raised his "declaratory judgment exception" argument in the Court below, he was barred from presenting it at the Court of Appeals. Next, the Court of Appeals ruled that, even if he were not so barred, Illinois has not adopted the "declaratory judgment exception" rule, and therefore the rule would have no applicability to the case at bar. Finally, the Court of Appeals concluded that, even if the "declaratory judgment exception" to the doctrine of *res judicata* were found applicable, " . . . Mandarino's pursuit of injunctive relief in his prior state court action would remove him from the protection of the rule." *Mandarino, supra,* 718 F.2d at 848-9; Petitioner's Appendix at 8a.

———o———

REASONS FOR DENYING THE WRIT

I.

The Court Of Appeals' Determination That The "Declaratory Judgment Exception" To The Doctrine Of Res Judicata Does Not Apply To The Case At Bar Was Correct, And Is Consistent With The Decisions Of The Supreme Court And With Illinois Law.

That Petitioner has cited not a single Illinois decision adopting, or even referring to, any "declaratory judgment exception," is no accident. As the Court of Appeals noted, Petitioner likewise offered no authority, in the proceedings below, for his assumption that Illinois courts have applied the "declaratory judgment exception" at any time. The one Illinois decision he did cite below, *LaSalle National Bank v. County of DuPage,* 77 Ill.App.3d 562, 396 N.E.2d 48 (1979), is not referred to in his Petition, perhaps because, as the Court of Appeals stated,

> "Although that case did hold that a second suit was not precluded by a prior declaratory judgment, the rationale relied on by the Court arose from the special characteristics of zoning cases. No weight was given to the fact that the prior action had involved only a declaratory judgment." *Mandarino, supra,* 718 F.2d at 848; Petitioner's Appendix at 7a.

Therefore, Petitioner's contention that the Court of Appeals erred in misinterpreting the significance of Petitioner's joinder, in his prior state court action, of claims for declaratory *and* injunctive relief, overlooks the more fundamental fact that the Court of Appeals ruled, initially, that Illinois courts have never recognized or applied, expressly or impliedly, any "declaratory judgment exception" to the doctrine of *res judicata.*

II.

The Court of Appeals' Determination That Traditional Rules Of Res Judicata Barred Petitioner's Claim Was Correct, And Is Consistent With The Decisions Of The Supreme Court And With Illinois Law.

Petitioner persists in confusing the doctrine of *res judicata* and collateral estoppel, or, as this Court termed the doctrines in *Migra v. Warren City School District Board of Education*, — U.S. —, 104 S.Ct. 892 (1984), claim preclusion and issue preclusion. Petitioner cites this Court's statement in *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S.Ct. 1883 (1982), regarding the doctrine of collateral estoppel, despite the fact that the case at bar in no way concerns that doctrine (see page 28 of the Petition); likewise, Petitioner cites an Illinois Appellate Court decision, *City of Burbank v. Glazer*, 76 Ill.App.3d 394, 395 N.E.2d 97 (1979), for the proposition that "Illinois adheres to the principle that where a cause of action is different from that brought in a prior suit, the parties are bound not by issues which 'could have been litigated' but only those that were actually litigated" (see page 32 of the Petition), despite the fact that *Burbank*, again, was a collateral estoppel case, not one involving *res judicata*.

Petitioner thus, perhaps unintentionally, attempts to mislead this Court by arguing that, under Illinois law, he would not have been precluded from raising his federal court claims in a subsequent suit, even though he had not raised them in his prior suit. Petitioner is apparently attempting to bring himself within this Court's ruling in *Migra, supra*. However, the key distinction between *Mi-*

darino and *Migra,* is that, unlike Ohio, Illinois is not in the process of modifying its claim preclusion doctrine, nor has Petitioner so contended.

The following decisions of Illinois courts and of federal courts interpreting Illinois law, and the cases cited therein, uniformly provide that *res judicata* bars all claims which were raised or could have been raised in a prior suit:

> *Bass v. Scott,* 79 Ill.App.3d 224, 398 N.E.2d 236 (1979): Plaintiff's declaratory judgment action against State Attorney General barred by prior suit for writ of mandamus against State Attorney General, as both actions sought enforcement of provisions of Illinois Optometrists Act.
>
> *Gasbara v. Park-Ohio Industries,* 655 F.2d 119 (7th Cir. 1981): Plaintiff's subsequent suit seeking fringe benefits from former employer barred by prior suit against same defendant for unpaid salary and bonuses.
>
> *Diaz v. Indian Head,* 686 F.2d 558 (7th Cir. 1982): Plaintiff's subsequent suit against former employer seeking commissions on sales completed after termination of his employment barred by prior suit against same defendant to have non-competition clause in employment contract declared unenforceable.

It is therefore clear that Illinois law bars those claims Petitioner raised in his federal court suit, as they all could have been raised in his prior state court action.

Petitioner's citation to *Industrial National Mortgage Company v. City of Chicago,* 95 Ill.App.3d 666, 420 N.E.2d 581 (1981) is not contrary, as it, like *LaSalle National Bank v. County of DuPage, supra,* concerned a zoning case in which a second suit challenging zoning restrictions was allowed because of changed factual circumstances.

Finally, Petitioner's reliance on *Wozniak v. County of DuPage,* 569 F.Supp. 813 (N.D.Ill. 1983) is misplaced, since the District Court plainly stated that it would allow a second suit against the same defendants sued by plaintiff in a prior suit because, *inter alia,* first, the facts of a conspiracy among the defendants were not available to plaintiff when the first suit was brought, and, second, plaintiff had won his first suit. As the District Court stated,

> "There are solid policy reasons for protecting a victorious defendant from repeatedly being hauled into court to answer to plaintiffs' successive bites at a single apple . . . Plaintiffs thus take their "second bite" from a far more favorable posture than the litigant who is unable to accept the fact of his initial loss." *Wozniak, supra,* 569 F.Supp. at 817.

The Court of Appeals' decision finding that Illinois has not adopted the "declaratory judgment exception" to the *res judicata* doctrine, that even if it had, petitioner would not fit within it, and that the traditional elements of *res judicata* barred petitioner's suit followed existing case law, and is in no way inconsistent with any decisions of this Court or with Illinois law.

III.

The Court Of Appeals' Determination That The "Declaratory Judgment Exception" Argument Of Mandarino Was Not Properly Before The Court On Appeal Was Correct.

Petitioner's contention that he did in fact raise his "declaratory judgment exception" argument in the District Court requires little attention, and would no doubt surprise the District Court. Nowhere in its 19-page opin-

ion is there any hint of Petitioner's "declaratory judgment exception". See Petitioner's Appendix at 13a-31a. Nor has Petitioner offered any refutation of the Court of Appeals' statement that:

> "Nowhere in his brief was the declaratory judgment exception mentioned. Section 33 of the Restatement (Second) of Judgments was not cited; neither were the cases Mandarino relies on in this Court to establish the "exception." *Mandarino, supra,* 718 F.2d at 848; Petitioner's Appendix at 6a.

Instead, Petitioner apparently assumes the District Court should have been gifted with extrasensory perception, for without powers of divination, the District Court could not have discerned Petitioner's "declaratory judgment exception" argument.

Perhaps realizing the hollowness of that argument, Petitioner then submits that the "ends of justice" require consideration of his "declaratory judgment exception" theory. Since the Court of Appeals did, in fact, consider —and reject—Petitioner's theory, it is unclear how justice has not been served. That the Court of Appeals chose to disagree with Petitioner is not proof of any miscarriage of justice.

IV.

There Are No Special Or Important Reasons Requiring Supreme Court Review Of This Case.

Petitioner has asserted no compelling reason for this Court to accept this case. He has argued no "split in the Circuits" regarding the "declaratory judgment exception", and indeed it would be difficult to imagine such a split concerning a rather obscure interpretation of Illinois state law. He has failed to demonstrate that the Court of

Appeals decided an important question of Illinois law in a way which is in conflict with Illinois law. He has proffered no important question of Federal law which should be decided by this Court, nor has he established any real conflict between the decision of the Court of Appeals and those of this Court. Finally, he has furnished no basis for the invocation of this Court's supervisory powers.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

Sarah Hansen Sotos
Judge & Knight, Ltd.

Patrick A. Lucansky
Klein, Thorpe & Jenkins, Ltd.

Counsel for Respondents